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No. 88-6222

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

SCOTT WAYNE BLYSTONE, Petitioner,
vs.

COMMONWEALTH OF PENNSYLVANIA, Respondent.

On Petition For Writ Of Certiorari To The
Supreme Court of the Commonwealth of Pennsylvania

BRIEF AMICI CURIAE

State of California, joined by the
States of Arizona, Connecticut, Idaho, Illinois,
Indiana, Montana, New Hampshire, Nevada, North
Carolina, South Carolina, Tennessee, Utah, Wyoming

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QUESTION PRESENTED

May a death penalty statute, which narrows the class of death penalty-eligible offenders and which provides for individualized consideration of all mitigating evidence proffered by an offender including evidence of the circumstances of the offense, guide and channel sentencer discretion by requiring that the death penalty be imposed if the aggravating circumstances outweigh the mitigating circumstances?

INTEREST OF AMICI CURIAE

Amici curiae are states which adopted death penalty statutes in response to this Court's decisions in *Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); and *Jurek v. Texas*, 428 U.S. 262 (1976). Those cases held that the Cruel and Unusual Punishment Clause of the Eighth Amendment of the United States Constitution requires that death penalty statutes suitably direct and limit the discretion of sentencers in death penalty cases in order "to minimize the risk of wholly arbitrary and capricious action." (*Gregg v. Georgia, supra*, at 189.) Pursuant to these decisions, we enacted capital punishment laws which narrowed the class of death-penalty

eligible offenders and which provided that our sentencers should consider all mitigating evidence as part of their individualized consideration of the defendants' crime and circumstances.

Having met our Eighth Amendment obligations, we relied on this Court's decisions to adopt various procedures for channeling and guiding sentencer discretion in determining penalty. These procedures included permitting "unbridled discretion" (*Gregg v. Georgia, supra*); "weighing" of aggravating and mitigating circumstances (*Proffitt v. Florida, supra*); and responding to specific questions about the defendant (*Jurek v. Texas, supra*). Yet, our statutes have been challenged because they channel and guide the exercise of sentencer discretion. (See,

e.g., *Hamilton v. California*, cert. den., __U.S.__, 109 S.Ct. 879, 880-882 (Marshall, J. dis.); *Bonin v. California*, cert. den., __U.S.__, 57 U.S.L.W. 3619 (Brennan, Marshall, J.J. dis.).)

In this case, petitioner is attacking Pennsylvania's death penalty statute which requires imposition of the death penalty if aggravating circumstances outweigh mitigating circumstances. He argues that this statute creates an unconstitutional so-called "mandatory" death penalty which

1. This Court has since granted the petition for writ of certiorari in *Boyde v. California* (No. 88-6613) which presents the question of whether it violates the Eighth and Fourteenth Amendments to instruct a jury that it "shall" impose a death sentence if the aggravating outweighs the mitigating in light of arguably misleading prosecutorial argument.

compels the sentencer to impose that punishment even if the sentencer believes that the punishment is inappropriate. We believe that petitioner's argument erroneously creates a third requirement -- death penalty laws -- "unbridled discretion" for the sentencer in the final determination of penalty. Petitioner's argument is contradicted by the precedents of this Court which we relied upon in drafting our death penalty statutes. We believe that if this argument is adopted, it will provide authority for further federal review of other state statutes that guide and channel sentencer discretion in order to minimize arbitrary and capricious action.

Indeed, this argument is yet another example of how an isolated phrase or limited portion of this Court's prior opinions concerning other states' statutes can be taken out of context and distorted into an attack on other dissimilar statutes. In this case, petitioner is misusing this Court's line of cases beginning with *Woodson v. North Carolina*, 428 U.S. 280 (1976) to argue that a mandatory death penalty is unconstitutional even when the statutory scheme provides for full consideration of all mitigating circumstances. Accepting petitioner's argument will endanger many statutes that were adopted in good faith reliance on this Court's assurance that there is no "right way for a State to set up its

capital sentencing scheme." (*Spasiano v. Florida*, 468 U.S. 447, 464 (1984).)

SUMMARY OF ARGUMENT

Pennsylvania's death penalty statute requires the sentencer to impose the death penalty if it finds that the aggravating circumstances outweigh the mitigating circumstances. Petitioner argues that this provision of Pennsylvania's law constitutes an unconstitutional so-called "mandatory" death penalty which allegedly deprives murderers of an individualized consideration of their offenses and circumstances.

Amici curiae submit that petitioner's argument mistakenly extends this Court's decisions on capital punishment. This Court has held that the Eighth Amendment requires that a

death penalty statute narrow the class of death-penalty eligible offenders and that the sentencer make an individualized determination of the proper sentence by considering all mitigating evidence. However, contrary to petitioner's argument, this Court's cases do not require that the sentencer have "unbridled discretion" in finally determining the appropriate penalty. Petitioner's position, by requiring "unbridled discretion," improperly intrudes into Pennsylvania's scheme for channeling and guiding sentencer discretion that is part of Pennsylvania's "effort to achieve a more rational and equitable administration of the death penalty." (*Franklin v. Lynaugh*, __U.S.__, 108 S.Ct. 2320, 2331 (1988) (White, J. plur.).)

Amici submit that no one system for imposing the death penalty is, or should be, preferred over any other valid system. "[E]ach distinct system must be examined on an individual basis." (*Gregg v. Georgia, supra*, 428 U.S. at 195.) Amici urge this Court to uphold Pennsylvania's statute and the instructions given in petitioner's case not because they are constitutionally compelled, but solely because they are not constitutionally prohibited.

ARGUMENT

THE PENNSYLVANIA DEATH PENALTY STATUTE PROPERLY REQUIRES THAT THE DEATH PENALTY BE IMPOSED IF AGGRAVATING CIRCUMSTANCES OUTWEIGH MITIGATING CIRCUMSTANCES SINCE THE STATUTE ALSO PROVIDES FOR THE NARROWING OF THE CLASS OF DEATH PENALTY-ELIGIBLE OFFENDERS AND PERMITS CONSIDERATION OF ALL MITIGATING EVIDENCE

Pennsylvania's death penalty statute narrows the class of death penalty eligible offenders and provides for consideration of all mitigating evidence, including evidence relating to the circumstances of the offense. (42 Pa. Cons. Stat. § 9711; *Commonwealth v. Blystone*, 549 A.2d 81, 92 (Pa. 1988); see *Commonwealth v. Maxwell*, 447 A.2d 1309, 1317-1318 (Pa. 1984).)

Pennsylvania's law requires the jury to impose the death sentence if it finds the existence of one statutory aggravating factor and no mitigating factors or if it finds that the

aggravating factors outweigh the mitigating factors. (42 Pa. Cons. Stat. § 9711(c)(iv).) Petitioner argues that this provision of the Pennsylvania law is unconstitutional because it creates a supposed "mandatory death penalty" that precludes individualized sentencing based on the circumstances of the offense and the offender.

Amici curiae submit that this argument is an unwarranted extension of this Court's jurisprudence. We contend that once a state establishes a rational scheme for the discretionary consideration of aggravating and mitigating factors, that further federal review is unnecessary. However, petitioner's argument would engraft a

third requirement of "unbridled discretion" for sentencers.^{2/}

2. In his brief on the merits, petitioner has departed from the question presented and has changed the focus of his attack from challenging the facial validity of Pennsylvania's statute to challenging the instructions based on Pennsylvania's statutory language which were given in his case. (See, e.g. *Penry v. Lynaugh*, ___ U.S. ___, 57 U.S.L.W. 4958 (1989).) This brief concerns itself with the facial validity attack first raised in the petition for writ of certiorari. Pennsylvania's brief deals with the attack on the instructions. Amici note that the Pennsylvania Supreme Court opinion affirming petitioner's death judgment does not indicate that petitioner challenged the instructions given in his case. Amici further note that to the extent that petitioner challenges the instructions on mitigating circumstances as incomplete because of the inclusion of qualitative modifiers to some of the mitigating factors (i.e. "extreme" mental disturbance, "substantial" domination etc.), that this argument has been rejected in other courts. (See, e.g. *People v. Ghent*, 43 Cal.3d 739, 776; 239 Cal.Rptr. 82; 739 P.2d 1250 (Cal. 1987); *People v. Adcox*, 47 Cal.3d 207, 270-271; 253 Cal.Rptr. 55; 763 P.2d 906 (Cal. 1988).)

As recently as 1988, this Court held that the Constitution "requires no more" than that death penalty statutes "narrow[] the class of death-eligible murderers and then at the sentencing phase allow[] for the consideration of mitigating circumstances and the exercise of discretion." (*Lowenfield v. Phelps*, ___U.S.___, 108 S.Ct. 546, 555 (1988).) However, this Court has never indicated that the states must guide the exercise of discretion in a certain way or, as petitioner apparently contends, permit that exercise of discretion to be unbridled. "Much in our cases suggests just the opposite." (*Franklin v. Lynaugh*, ___U.S.___, 108 S.Ct. 2320, 2331 (1988) (White, J. plur.).)

Initially, amici note that the Pennsylvania statute is not the type of "mandatory" statute first condemned by this Court in *Woodson v. North Carolina*, *supra*. Unlike the "mandatory" statutes invalidated by this Court, Pennsylvania's statute permits consideration of all mitigating evidence. (*Commonwealth v. Cross*, 496 A.2d 1144, 1151 (Pa. 1985).) Furthermore, unlike the true "mandatory" statutes this Court denounced in *Woodson*, Pennsylvania's law is consistent with the Eighth Amendment requirement that the death penalty be imposed in a rational and non-arbitrary fashion. (*Commonwealth v. Peterkin*, 513 A.2d 3673, 387-388 (Pa. 1986).)

Prior to *Furman v. Georgia*, 408 U.S. 238 (1972), capital sentencers

had unbridled discretion in determining penalty. (*McGautha v. California*, 402 U.S. 183 (1971).) However, in *Furman*, this Court declared such total discretion unconstitutional because it lead to irrational and arbitrary results. (*Gregg v. Georgia*, 428 U.S. 153, 188 (1976) citing *Furman v. Georgia*, *supra*.) Since *Furman*, this court has "identified a constitutionally permissible range of discretion in imposing the death penalty." (*McCleskey v. Kemp*, 481 U.S. 279, 305 (1987).) That permissible range falls between "a required threshold below which the death penalty cannot be imposed" and the requirement that the sentencer consider all mitigating evidence. (*Id.* at 305-306; see also *California v. Brown*, 479 U.S. 538, 541 (1987).)

This Court has merely indicated that it will tolerate "unbridled discretion" once a sentencer has determined that a murderer has crossed the threshold of death-penalty eligibility and has considered all mitigating evidence. "[T]his Court has never held that jury discretion must be unlimited or unguided; we have never suggested that jury consideration of mitigating evidence must be undirected or unfocused; we have never concluded that States cannot channel jury discretion in capital sentencing in an effort to achieve a more rational and equitable administration of the death penalty." (*Franklin v. Lynaugh*, *supra*, 108 S.Ct. 2331) (White J. plur.).)

It is understandable why states choose to canalize the discretion

of sentencers in considering the circumstances and determining the final penalty. This Court invalidated death penalty statutes in 1972 because the sentencing procedures then in effect created "a substantial risk that [the death penalty] would be inflicted in an arbitrary and capricious manner." (*Gregg v. Georgia, supra*, 428 U.S. at 188 citing *Furman v. Georgia, supra*.) Channeling a sentencer's discretion can serve the "useful purpose" of precluding consideration of extraneous emotional factors unrelated to the evidence. (See *California v. Brown, supra*, 479 U.S. at 543.) Furthermore, states can ensure that the death penalty will be imposed "with regularity," rather than "freakishly or rarely." (*Proffitt v. Florida*, 428 U.S. 242, 260 (1976))

(*White, J. conc.*); *Jurek v. Texas*, 428 U.S. 262, 278-279 (1976) (*White, J. conc.*)). The channeling of sentencer discretion can "minimize the risk of wholly arbitrary and capricious action." (*Gregg v. Georgia, supra*, at 189.) Such schemes promote the rational and predictable administration of death penalty laws. (*California v. Brown, supra*, 479 U.S. at 541.) Standards for the consideration of all evidence provide a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." (*Furman v. Georgia, supra*, 408 U.S. at 238 (*White, J. conc.*)). They also foster reliability and further judicial review. (*California v. Brown, supra*, 479 U.S. at 543.)

These schemes do not sacrifice the requirement that death sentencing be individualized because they do not preclude the admission and consideration of any relevant mitigating evidence. As a "practical matter" sentencers will be aware of the consequences of their weighing of the aggravating and mitigating. (*Franklin v. Lynaugh*, *supra*, 108 S.Ct. at 2331 fn. 12 (White, J. plur.)) The "weighing" process does not eliminate subjectivity, but it does set "clear and objective" standards to minimize discrimination. (*Gregg v. Georgia*, *supra*, 428 U.S. at 189, 198.)

Finally, these "weighing" statutes resolve any "tension" that may exist between the Eighth Amendment requirements that the death penalty be imposed in a rational manner and that

the sentencer consider all potential mitigating evidence. (*Franklin v. Lynaugh*, *supra*, 108 S.Ct. at 2331 (White, J., plur.) citing *California v. Brown*, *supra*, 479 U.S. at 544 (O'Connor, J., conc.)) Since these statutes do not preclude consideration of any mitigating evidence, they protect the Eighth Amendment interest in ensuring that the death penalty is "appropriate" in a particular case. (*Woodson v. North Carolina*, *supra*, 428 U.S. at 305 (Stewart, J., plur.) Yet, by requiring that the death penalty then be imposed if the aggravating circumstances outweigh mitigating circumstances, these statutes also promote the Eighth Amendment requirement that the capital sentencing decision be a "reasoned moral response" to the evidence. (*Penry v.*

Lynaugh, __U.S.__, 57 U.S.L.W. 4958, 4965 (1989).)

Taking their cue from this Court, many states have chosen to follow the approach of channeling and guiding the sentencer's consideration of aggravating and mitigating circumstances.^{3/} For instance, Arizona law requires imposition of the death penalty if the sentencer finds one aggravating factor and no mitigating factors substantial enough to call for leniency. The Arizona courts have interpreted this formula as requiring the imposition of the death sentence if aggravating circumstances qualitatively outweigh mitigating circumstances.

3. A complete list of all state statutes with statutory schemes similar to Pennsylvania's is set forth in Pennsylvania's brief on the merits.

(*State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1, 13-14 (Ariz. 1983).) This requirement means that "a defendant will stand the same chance of receiving the death penalty from a judge [the Arizona sentencer] who does not philosophically believe in the death penalty as from a judge who does." (*State v. Beaty*, 158 Ariz. 519, 762 P.2d 19, 534 (Ariz. 1988).) Thus, the death penalty "is then reserved for those who are above the norm of first-degree murderers or whose crimes are above the norm of first degree murders, as the legislature intended." (*Ibid.*)^{4/}

4. The Arizona death penalty formula was declared unconstitutional by the Ninth Circuit in *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988). Arizona's petition for writ of certiorari is currently pending before this Court in *Ricketts v. Adamson*, (No. 88-1553).

California requires that the death penalty "shall" be imposed if aggravating circumstances outweigh mitigating circumstances. These circumstances are based on the evidence presented in the guilt and penalty phases. The determination is not a mechanistic or numerical process. (*People v. Brown*, 40 Cal.3d 512, 541; 220 Cal.Rptr. 637, 709 P.2d 440 (Cal. 1985).) However, the determination of appropriateness is inherent in the "weighing" process. To instruct penalty phase jurors that they may ignore the outcome of the "weighing process" "comes perilously close to violating the mandate of [*Furman*] that the jurors must be given specified standards or guidelines within which to focus their discretion . . . [and] would invite

arbitrary decisions based on improper or irrelevant sentencing considerations . . ."
 . . . (*People v. Hendricks*, 44 Cal.3d 635, 654; 244 Cal.Rptr. 181; 749 P.2d 836 (Cal. 1988).)^{2/}

Similarly, New Jersey mandates a death penalty if the aggravating factors outweigh mitigating factors. However, such a law is "hardly the automatic imposition of death found unconstitutional in [*Woodson*]. . . ." since New Jersey law permits consideration of all mitigating factors. (*State v. Price*, 195 N.J. Super 285, 478 A.2d 1249, 1254-1255 (N.J. Super L. 1984).) The New Jersey courts have

5. For instance, jurors would not be able to consider residual or lingering doubt about guilt as a mitigating factor. (*Franklin v. Lynaugh, supra*, 108 S.Ct. at 2326-2328, 2334-2335 (O'Connor, J. conc.).)

noted that this Court has never required a so-called "mercy" provision. (*Ibid.*)

New Jersey has rejected the argument that a jury should also decide explicitly that death is the "appropriate" penalty since the vagueness of that term would "undermin[e] the principle, also constitutionally mandated, that the death sentence be meted out in a manner that is not arbitrary or capricious."

(*State v. Ramseur*, 106 N.J. 123, 524 A.2d 188, 287 fn.81 (N.J. 1987).)

Illinois requires imposition of the death penalty if there are no mitigating factors sufficient to preclude that punishment. This finding "is synonymous with a finding that death is the appropriate penalty." (*People v.*

Montgomery, 122 Ill. 517, 98 Ill.Dec. 353, 494 N.E.2d 475, 482 (Ill. 1986).)

Maryland courts have also rejected the argument that juries should be instructed that they may impose a life sentence without regard to the relative weights of aggravating and mitigating factors. Otherwise, "there would be no principled or rational way to differentiate the few cases in which the death penalty is justified from the many in which it is not." (*People v. Tichnell*, 306 Md. 428, 509 A.2d 1179, 1199 (Md. 1986).) Such an instruction would permit "unguided discretion." (*Grandison v. State*, 305 Md. 685, 506 A.2d 580, 616 (Md. 1986).)

Ohio requires the jury to recommend the death penalty to the court if aggravating factors outweigh

mitigating factors beyond a reasonable doubt. Since Ohio law permits the introduction of any relevant mitigating factors, Ohio courts have found that this system comports with the Eighth Amendment. (*State v. Jenkins*, 15 Ohio St. 164, 473 N.E.2d 264, 280-281. (Ohio 1984) discussing *Barclay v. Florida*, *supra*, 463 U.S. at 958 (Stevens, J.J. conc.).)

Tennessee has upheld its analogous death penalty law since its statute requires the sentencer to consider all mitigating factors. (*State v. Dicks*, 615 S.W.2d 126, 131 (Tenn. 1981).)

Finally, the State of Washington requires that the death penalty be imposed if "there are not sufficient mitigating circumstances to

merit leniency. . . ." (*State v. Jeffries*, 105 Wash.2d 398, 717 P.2d 722, 737 (Wash. 1986).) Washington has rejected the argument that this statute imposes a "mandatory" death penalty in violation of *Woodson*, since the statute allows for jury discretion in considering all mitigating factors. However, once the jury has exercised that discretion, "[i]t is only at this point that the death penalty becomes mandatory. . . . The result is that the penalty of death is not arbitrarily or capriciously imposed, but instead is imposed in a just manner." (*Id.* at 737-738; see also *Campbell v. Kincheloe*, 829 F.2d 1453, 1466 (9th Cir. 1987).)

Montana's law is similar to Washington's in requiring a death penalty if there are no mitigating

circumstances sufficiently substantial to call for leniency. (*People v. Coleman*, 605 P.2d 1000, 1016.) However, Montana has held that such a scheme is not an unconstitutional mandatory statute since Montana's statute requires its sentencers to consider all facts existing in mitigation. (*Id.* at 1017; see also *McKenzie v. Risley*, 842 F.2d 1525, 1543 (9th Cir. 1988).)

These states have chosen, along with Pennsylvania, to provide guidance and direction to its sentencers. Nothing in this Court's precedents militates against that choice. Indeed, an analysis of this Court's decisions indicates that the Eighth Amendment encourages these states' choice of action.

In *Gregg v. Georgia*, *supra*, this Court rejected the argument that the Georgia statute was unconstitutional because it permitted a jury to decline to impose the death penalty even when aggravating circumstances were present by merely stating that such discretion did not violate the Constitution. (*Id.* at 199, 203.) In *Zant v. Stephens*, 462 U.S. 862 (1983), this Court rejected a renewed challenge to Georgia's "unbridled discretion" by simply noting that the Constitution did not require specific standards for the jury's consideration of aggravating and mitigating circumstances. (*Id.* at 875, 876 fn. 13, 880, 890.)

Obviously, *Gregg* did not prohibit states from channeling discretion if the states thought it

necessary and desirable. In *Proffitt v. Florida, supra*, this Court approved a statute, like Pennsylvania's, that required imposition of the death penalty if the aggravating circumstances outweighed the mitigating circumstances. Florida interpreted its statute as compelling a death judgment in the absence of mitigating circumstances. (*Barclay v. Florida*, 463 U.S. 939, 961-962 (1983) citing *Cooper v. State*, 336 S.2d 1133, 1142 (Fla. 1976) (Stevens, J. conc.); see also *Woodson v. North Carolina*, 428 U.S. 280, 315 (1976) (Rehnquist, J. dis.); *Roberts v. Louisiana*, 428 U.S. 325, 362 fn. 8 (1976) (White, J. dis.).) The concurrence in *Proffitt* praised the Florida statute because it "required" the sentencer to impose the death

penalty if aggravating outweighed mitigating. (*Proffitt v. Florida, supra*, 428 U.S. at 260-261 (White, J. conc.).) When this Court again approved Florida's statute in *Barclay v. Florida, supra*, that state still interpreted its statute as establishing a rebuttable "presumption" of death. (*Barclay v. Florida, supra*, 463 U.S. at 961-962 citing *Williams v. State*, 386 S.2d 538, 543 (Fla. 1980) (Stevens, J. conc.).)

Notably, this Court also approved the Texas death penalty scheme. (*Jurek v. Texas*, 428 U.S. 262 (1976).) That statute required that the death sentence be imposed if the sentencer answered three questions about the defendant in the affirmative. This Court approved the statute because it narrowed the class of death-penalty

eligible murderers and because it permitted the sentencer to consider all mitigating circumstances. (*Id.* at 270-276 (*Stewart, J. plur.*)). The concurrence in *Jurek* noted that the sentencer "must" impose the death penalty if it answered the questions affirmatively and that the statute did "not extend to juries discretionary power to dispense mercy. . . ." (*Id.* at 279 (*White, J. conc.*)); see also *Woodson v. North Carolina, supra*, 428 U.S. at 315 (*Rehnquist, J. dis.*); *Roberts v. Louisiana, supra*, 428 U.S. at 359 (*White, J. conc.*)). *Franklin v. Lynaugh, supra*, reaffirmed the constitutionality of Texas' death penalty scheme on the assumption that the statute permitted consideration of all mitigating evidence. (*Franklin v.*

Lynaugh, supra, 108 S.Ct. at 2330-2332 (*White, J. plur.*), 2333 (*O'Connor, J. conc.*)). ^{4/}

6. This Court's recent opinion in *Penry v. Lynaugh*, __U.S.__, 57 U.S.L.W. 4958 does not affect this analysis. In *Penry*, this Court merely held that Texas juries must be permitted to consider and give effect to mitigating evidence without being restricted by the three "special issues" that Texas juries must answer affirmatively to impose the death penalty. *Penry* is no more than an extension of the line of cases beginning with *Jurek v. Texas, supra*, and *Woodson v. North Carolina, supra*, that require sentencers to consider and give independent weight to all relevant mitigating evidence in order to ensure that the death penalty is "appropriate". That, of course, is an question separate from the one presented in this case--whether states may guide and channel the decision that follows the consideration of that evidence. In fact, this Court merely held "there is no constitutional infirmity in a procedure that allows a jury to recommend mercy based on the mitigating evidence. . . ." (*Id.* at 4964.) Once again, this Court is merely indicating that it will tolerate such discretion. *Penry* must be analyzed in the context of the peculiar Texas statute. Its holding cannot be extended to other states, such as Pennsylvania, which already permit full consideration

This Court's other precedents also indicate, sometimes by negative implication, that "unbridled discretion" is not a constitutional requirement. In *California v. Ramos*, 463 U.S. 992 (1983), this Court reiterated that the Constitution is not violated by a scheme that permits a jury to exercise unbridled discretion in choosing a penalty once a defendant is found to be a member of the class of death-eligible offenders. (*Id.* at 1008-1009 fn. 22 citing *Zant v. Stephens*, *supra.*) In *Turner v. Murray*, 476 U.S. 28 (1986), this Court analyzed the Virginia death penalty law which allows the sentencer to reject the death penalty if there are aggravating circumstances present, but no mitigating circumstances. The

of all mitigating evidence.

plurality noted that "Virginia's death penalty statute gives the jury greater discretion than other systems which we have upheld against constitutional challenge." (*Id.* at 34 citing *Jurek v. Texas* (White, J. plur.).)

Thus, to argue that Pennsylvania's death penalty is unconstitutional, petitioner twists this Court's jurisprudence inside out. He transforms permission to have "unbridled discretion" into a prohibition of any canalization of sentencer discretion whatsoever. In doing so, he advocates a third federal requirement that sentencing discretion be unbridled that will preclude legitimate state efforts to direct and guide sentencers in a rational and equitable fashion.

This Court has long recognized the limited and specific nature of its responsibility when reviewing a capital punishment scheme. (*Gregg v. Georgia, supra*, 428 U.S. at 195.) Given past practice, Amici nevertheless expect that whatever the Court's decision in this case, it will generate renewed attacks on each of the statutory schemes authorizing the death penalty. We urge the Court, therefore, not only to uphold Pennsylvania's statute, but to reaffirm the position it took in *Pulley v. Harris, supra*, 465 U.S. at 45: "To endorse the statute as a whole is not to say that anything different is unacceptable."

CONCLUSION

Amici curiae request this Court to affirm the judgment of the Supreme Court of the Commonwealth of Pennsylvania.

Respectfully submitted,

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